

(1997) 01 DEL CK 0040

In the Delhi High Court

Case No : Letters Patent Appeal No. 1 of 1982

Union of India

APPELLANT

Vs

Indian Plastics and Chemicals

RESPONDENT

Date of Decision : 10-01-1997

Acts Referred:

Central Excise Rules, 1944 — Rule 8

Citation : (1997) 1 AD 459 : (1997) 65 DLT 468 : (1997) 40 DRJ 430 : (1997) 91 ELT 565

Hon'ble Judges : M. Jagannadha Rao, C.J; Manmohan Sarin, J

Bench : Division Bench

Advocate : A.N. Haksar, A.K. Wali and A.K. Roy, for the Appellant;

Judgement

Manmohan Sarin, J.

(1) This is a Letter Patents Appeal against the order of the learned Single Judge dated 22.12.1980 in Civil Writ Petition No.750/92. The learned Single Judge by the impugned judgment quashed the orders dated 10.12.1968, 30.4.1969, 30.7.1969 and 27.5.1972, pertaining to the levy of excise duty under tariff item No.15-A on the solution of Phonetic Resin produced by the respondents. The appellants, by the impugned judgment, were further directed to refund the excise duty of Rs.8,70,710.40p. to the respondents.

(2) The respondents in the writ petition had challenged the levy of excise duty on the aqueous solution of Phonetic Resin. The learned Single Judge after considering the literature and material produced on record and rival submissions of the parties reached the finding and conclusion that the product of the respondents in appeal and petitioners in the writ petition, was only an intermediary product and was not resin manufactured in liquid form and did not fall within the tariff item 15-A and, hence, was not exigible to excise duty. The learned Single Judge, as noted above, has accordingly quashed the orders pertaining to the levy of excise duty and directed refund of the duty collected.

(3) The present appeal was admitted to hearing on 5.2.1982. The appellant Union of India was directed on 30.8.1983 to deposit the sum of Rs.6,24,420.77 after taking into account the submission that certain amount had already been refunded. Vide orders dated 9.1.1984 the respondents were permitted to withdraw the amount subject to furnishing bank guarantee and to further condition that it would pay interest

(4) T facts may be noticed in brief: (i) The respondents manufacture aqueous solution of Phonetic resin, the contents of the solution being 40% to 43%. The present appeal is concerned with the excise duty claim on the aqueous solution of Phonetic resin processed by the respondents during the period 16.9.1968 to 31.8.1970. Tariff item 15-A at the relevant time read as under: "Artificial or synthetic resin and plastic materials and articles thereof - (1) Artificial or synthetic resin and plastic materials in any form, whether solid, liquid or pasty or as a powder, granules or flakes, or in the form of molding powders, the following namely: (i) Condensation, poly - condensation and poly-addition products, whether or not modified or polymerized including phono plastics, Aminoplasts, Alkyds, Polyurethane, Royally Esters and other Unsaturated Polyesters." (ii).Under the aforesaid item excise duty @30% ad valorem plus special excise duty @20% of basic excise duty was payable. By Notification No. 156/65 issued by the Central Government under Rule 8 of the Central Excise Rules, certain exemptions were granted in respect of three types of synthetic resin, including Phonetic resin. The effect of the notification was that Phonetic resins were exempted from so much of the duty of excise livable thereon as was in excess of 80 paise per kilogram. The Notification provided that the manufacturer claiming benefit under the Notification would not be permitted to pay duty livable on the resins manufactured by him at the ad valorem rate. (iii).The respondents on the strength of the Notification No.156/65 submitted a Classification List for payment of duty in terms of the notification subject to the duty being on the plastic content of the resin solution only. The respondents had put the specific condition since if the excise duty was to be charged on the entire weight of the solution then the respondents would be paying more duty under such exemption than the ad valorem duty on the value of the solution. The excise duty was assessed on a provisional basis @0.80p. per Kg. plus the special excise duty of 20% on the Phonetic resin content of the said solution taken at 45%. The excise authorities had drawn samples of the respondents' products on 14.9.1968 and 10.12.1968. The Central Excise Officer discontinued the provisional assessment claiming that the duty would have to be charged on the whole of the Phonetic resin solution, as presented at the time of clearance. It was claimed that the Chemical Examiner on analysis of the samples of Phonetic resin had reported that it was not possible to estimate the amount of resin in the aqueous solution. The respondents disputed this position claiming there were standard methods for testing the resin contents, which were accepted by international bodies, such as the American Society for Testing of Materials and British Standard Institution. The respondents also informed the Excise authorities

that they were sending the sealed samples for analysis to the Central Public Health and Engineering Research Institute (CPHERI). The samples sent were those that had been kept under the seal of the excise authorities. The percentage of resin found was 41%. In the meanwhile, the excise authorities confirmed the demands raised on final assessment. Appeal before the Collector of Excise was dismissed as also the revision petition before the Government of India. The respondents claim that the result of the samples taken showed the resin content as varying between 41% to 43%.

(5) The appellants in the appeal have inter alia contended that the learned Single Judge erred in holding that the aqueous solution of Phonetic resin was an intermediary product and would not fall within item 15-A. It is contended that the learned Single Judge should have held that it was a finished product and a liquid solution of resin used by the respondents themselves. The appellants contend that the product was Phonetic resin in liquid form, as was known in the market and chemistry. Reference is made to the book titled "Phonetic Resins" by David F. Gould wherein it is mentioned that "liquid Phonetic resins are water soluble types and available in a number of varieties." Reference is also made to the book "Phono plastics" by T.Z. Karzwell to support the view that phono plastic resins for the plywood industry is supplied in (i) aqueous solution containing 40% solids; (ii) spray dried powder; and (iii) film adhesive. It is, thus, contended that the respondents' product which contains about 40 per cent or more percentage of non-volatile residue and which is in the form of liquid is technically phenol formaldehyde resin in the form of liquid. It is contended that the mere presence of water, which is present from the very beginning, will not make it any less resin.

(6) Mr. Haksar, learned senior advocate for the respondents, submitted that aqueous solution of Phonetic resin was an intermediate product and not an end product or fully manufactured resin, as is known in the chemistry and market. It was the admitted position that the respondents were not isolating the final product resin from the resin solution by the process of vacuum distillation or evaporation. The process of completing the process of manufacture of Phonetic resin was never adopted by the respondents, who stopped at the stage of aqueous solution of Phonetic resin in which the Phonetic resin content was 40% to 43% and less than 45%.

(7) We find considerable merit in the submission of Mr. Haksar, as found by the learned Single Judge. The process of manufacture of Phonetic resin may be noted as under: "Phenol and Formaldehyde solution in water are mixed in kettle with further water and a small quantity of a catalyst (Caustic Soda in this case). Formaldehyde is used as Formaline which is a solution of Formaldehyde, Phonetic Resin is formed but remains in solution in water. By subsequent processes the Phonetic resin is separated and made into solid and pasty form. These processes are further cooking, followed by separation from solution by any of the three processes namely vacuum distillation, by evaporation of water or spray drying or by precipitation. It is only after any of these three processes are

gone through that Phonetic resin comes into existence as known in the market or in chemistry."

(8) The respondents have rightly relied on the test reports in respect of the samples drawn on 14.9.1968 and 31.1.1965 wherein the samples drawn were found to be aqueous solution of Phonetic resin. The percentage of resin contents were found to be varying between 42% to 43.4%. The conclusion reached by the learned Single Judge in the circumstances that the solution of Phonetic resin produced by the respondents would not fall within item 15-A of the tariff cannot be faulted with. This is so since Phonetic resin is manufactured only after the process, including that of distillation and evaporation, is completed. The mere fact that in the plywood industry the aqueous solution is used, which is an intermediate product, before the stage of manufacture can also be regarded as resin in liquid form, does not help the appellant. The product is an aqueous solution of resin and not resin in liquid form, as held by the learned Single Judge.

(9) Reference in this connection may also be made to the decision of the Apex Court in *Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad*, . In the said decision the Apex Court held that resold or "A" stage synthetic resin, even though specified in the tariff item 15-A(1) of the erstwhile Central Excise tariff, would not be dutiable if it is not shown to be marketable. The Tribunal had held that once the product answered the Chemical description in the tariff item, it was assessable to duty. The Apex Court reversed this finding holding that the same was not well founded. The Apex Court held that the goods so produced must also satisfy the test of marketability. The Apex Court further held that even though the goods were excisable goods mentioned in the schedule but they could not be subjected to duty since either they were not produced or manufactured or if they had been produced or manufactured, they were not marketed or capable of being marketed. Thus, the test of marketability or capability of being marketed of the goods in addition to manufacture was approved. Learned counsel for the appellants sought to distinguish this decision by arguing that said the case was concerned with whether the item was a resold or not? The said argument completely overlooks the rationale and principle laid down, viz. that even if the goods could answer the Chemical description in the tariff, the condition of manufacture or production and marketability and capability of being marketed had to be met. In the instant case when the manufacture of resin was not complete and is in the intermediate stage, the aqueous solution of resin would not meet the test of manufacture and marketability and, hence, the same would not be assessable to excise duty.

(10) Learned counsel for the respondents has also relied on certain instructions issued by the Central Board of Customs and Excise to show that where the weight of the solvent exceeds 50% of the weight of the solution, the solution of artificial or synthetic resin in volatile organic solvents are excluded from the scope of the tariff entry. It is, however, not necessary to advert to this argument except to notice that they only seem to explain the tariff entry.

(11) It is also pointed out by learned counsel for the respondents that pursuant to the judgment in this case, the tariff item has been specially amended to include the "solution of resin" within the purview of the item which would tend to show that it was not so earlier. It is not necessary to advert to this argument, since we have affirmed the finding of the learned Single Judge that the aqueous solution of resin produced by the respondents is an intermediate product and not resin in liquid form, which was assessable to excise duty at the relevant time.

(12) The appeal has no merit and is dismissed. The bank guarantee given by the respondents would stand discharged.